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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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No. 77-1540

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INTERNATIONAL BUSINESS MACHINES CORPORATION,  
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,  
*Respondents.*

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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REPLY TO OPPOSITIONS

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Petitioner International Business Machines Corporation submits this reply to the opposition to its petition for a writ of certiorari submitted by the Federal Communications Commission ("Commission") and the United States (together the "federal respondents") and the opposition submitted by American Telephone and Telegraph Company ("AT&T").

**I. The Court Should Grant Certiorari and Vacate the Decision Below in Light of the Federal Respondents' Change of Position.**

The federal respondents, in opposing certiorari, have made a dramatic change of position from the argument they made in the court below. That change makes clear that the ground on which the Second Circuit affirmed the Commission's orders is *not* a ground on which the Commission rested its decision. In these circumstances, this Court should grant certiorari, vacate the decision below, and remand the case to the Second Circuit for reconsideration in light of the federal respondents' new position.

The federal respondents now squarely assert that the Commission, in deciding to regulate resellers, did not intend in any way to resolve the question whether it had the power to forbear from regulating them.<sup>1</sup> This clarification of the Commission's decision is welcome. But it does not remove the need for further review in this matter. If anything, it heightens that need. For the federal respondents made precisely the opposite argument in the Second Circuit: there they argued that the Commission had resolved the question of its forbearance power and had ruled that it did not have power to forbear. Commission counsel asked the Second Circuit to affirm on the ground that this Court's decision in *FPC v. Texaco*, 417 U.S. 380 (1974), denied the Commission any power to forbear,<sup>2</sup> and the court of appeals affirmed the Commission on precisely that ground.<sup>3</sup>

<sup>1</sup> Brief for the Federal Communications Commission and the United States in Opposition ("Fed. Resp. Opp.") at 5-7.

<sup>2</sup> *Id.* at 5; *see* Brief for Respondents in the Second Circuit at 49-50.

<sup>3</sup> The court ruled:

"This distinction between an agency's lack of discretion to choose whether to regulate and its broad discretion in choosing *how* to regulate was clear to the FCC in the instant case. The

As a result, the decision below rests on an incorrect legal basis that—as the federal respondents make clear—is not a ground on which the Commission itself relied. Indeed, the Commission now declares that, contrary to the decision below, it regards the issue of its forbearance power to be entirely open. Therefore, under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the Second Circuit's decision should be vacated and the case remanded to the Second Circuit for reconsideration.

The federal respondents contend that action by this Court is unnecessary, because the Second Circuit's erroneous ruling can be ignored as "no more than dictum, not binding on the Commission or any other party."<sup>4</sup> But the decision below cannot so easily be wished away. The federal respondents' brief in this Court will not be published in the Federal Reports, as has the Second Circuit's decision. Despite the Commission's clarification of its own ruling, the Second Circuit's broad interpretation of *FPC v. Texaco* will, like a derelict buoy, remain afloat to disrupt navigation in this important area of federal law.<sup>5</sup>

FCC specifically endorsed the view expressed by one of the parties that "the Act . . . imposes certain obligations upon all carriers, and upon the Commission, which cannot be shirked . . . ." The FCC's understanding of the applicable legal standards is reflected further in its reliance on *F.P.C. v. Texaco, Inc.*, 572 F.2d 17, 26, App. A at 19a (citations omitted; emphasis in original).

<sup>4</sup> Fed. Resp. Opp. at 7.

<sup>5</sup> The decision below conflicts not only with the Commission's clarified position, but also—as we have shown—with decisions in other circuits. Respondent AT&T disputes petitioner's contention that the decision below created a conflict with *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966), and *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975). But AT&T's argument that those cases are different because they involved CATV facilities misses the point. In both

Moreover, the confusing statements in the Commission's own decision about its power to forbear<sup>6</sup> suggest that its failure to resolve that important question resulted at least in part from uncertainty regarding the proper interpretation of *FPC v. Texaco*. As discussed above, the Second Circuit's decision can only compound that confusion. Even if this Court decides not to vacate, the Court should grant certiorari to review on the merits this important question regarding the Commission's forbearance power and the proper interpretation of this Court's *Texaco* ruling. This unresolved issue is squarely presented and is ripe for review by this Court.<sup>7</sup>

## II. Respondents Err in Contending That the Issue of the Scope of the Commission's Jurisdiction is Inappropriate for Review.

Respondents offer two reasons why the Court should not review the important issue whether the Commission has statutory power to regulate resellers under Title II of the Communications Act. Both reasons are erroneous.

First, respondents misleadingly suggest that consideration of the issue is barred by Section 405 of the Act, 47 U.S.C. § 405, because the issue was not presented

cases, the courts assumed for purposes of decision that the CATV systems at issue were communications common carriers and sustained Commission decisions not to impose common carrier entry and rate regulation on those systems. The ground of both decisions—that the Commission has power to forbear—directly conflicts with the decision below.

<sup>6</sup> See Fed. Resp. Opp. at 5 n.13; compare *id.* at 5-7 with Brief in Opposition for Respondent American Telephone and Telegraph Company ("AT&T Opp.") at 6-8 and with Brief for Respondents in the Second Circuit at 49-50.

<sup>7</sup> AT&T asks the Court to decline review because the forbearance issue is "premature." AT&T Opp. at 2-6. That suggestion misses the point that the court below has squarely and erroneously decided

to the Commission.<sup>8</sup> The court below dismissed a similar suggestion without even discussing it. The argument that resellers are not common carriers under the Communications Act was pressed on the Commission by the Office of Telecommunications Policy, which cited the identical authorities petitioner cites here and cited below.<sup>9</sup> The Commission and the court below considered the argument and the authorities that support it.<sup>10</sup>

Second, respondents argue the merits of the issue. AT&T suggests that petitioner's statutory argument somehow turns on the question of who owns the transmission facilities. It does not. The distinction made by the Communications Act is between "common carriers,"

the issue, holding that its result is compelled by *FPC v. Texaco*. AT&T, having urged the Second Circuit to affirm the Commission on the ground that the Commission had correctly resolved the forbearance issue, is in no position to argue that the issue is premature.

In any event, AT&T distorts the Commission's decision by arguing that the Commission significantly tailored its regulatory controls to reflect its findings that the resale industry was naturally competitive. In fact, the Commission concluded that, despite these findings, resale

"will be regulated in basically the same manner as other common carriage." *Initial Order*, 60 F.C.C.2d at 261, App. B at 100b-101b.

Thus, resellers will bear "basically the same" regulatory burdens as real public utilities such as the telephone companies. The Second Circuit's decision, unless vacated, may be read to stand for the erroneous proposition that the Commission was legally compelled to impose those burdens despite the competitive nature of resale activities.

<sup>8</sup> Fed. Resp. Opp. at 8; AT&T Opp. at 10 n.7.

<sup>9</sup> See Reply Comments of the Office of Telecommunications Policy, Executive Office of the President, at 3-20.

<sup>10</sup> See 60 F.C.C.2d at 303-08, App. B at 77b-87b; 572 F.2d at 23-26, App. A at 15a-18a.



who engage in actual "transmission" by operating transmission facilities—whether owned or leased—and other entities, who do not.<sup>11</sup> Resellers indisputably do not. Under decisions of this Court, which respondents do not even discuss, this means that resellers are not within the statutory definition.<sup>12</sup>

Respondents have not seriously disputed the importance of this issue as a determinant of the limits of the Commission's regulatory power. The boundary of the Commission's regulatory authority under Title II of the Communications Act remains an important, unresolved question meet for review along with the issue of the Commission's forbearance power in light of *FPC v. Texaco*.

<sup>11</sup> This Court has held that the parallel definition in the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (1976)—the predecessor of the Communications Act—applied to those who *operated* rail transportation facilities. Its application did not turn on ownership. See *United States v. American Railway Express Co.*, 265 U.S. 425, 430-34 (1924).

<sup>12</sup> See cases cited in IBM Petition at 14-15 n.34.

## CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be vacated for reconsideration in light of the federal respondents' change of position in this Court. In the alternative, the Court should grant certiorari and review the decision below on the merits.

Respectfully submitted,

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